**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **PEDRO MUNOZ, JR.** | ) | |
| Claimant | ) | |
| V. | ) | Docket No. 1,065,396 |
| | ) | |
| **ASSOCIATED WHOLESALE GROCERS** | ) | |
| Self-Insured Respondent | ) | |

## ORDER

Both parties appealed the August 10, 2015, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on December 15, 2015.

### APPEARANCES

Keith L. Mark of Mission, Kansas, appeared for claimant. Kristina D. Schlake of Kansas City, Kansas, appeared for respondent.

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed respondent paid claimant compensation based upon a 5 percent whole person functional impairment on August 24, 2015. The parties also agreed the first time claimant requested interest be assessed pursuant to K.S.A. 44-512b was in his submission letter to the ALJ.

### ISSUES

ALJ Howard awarded claimant permanent partial disability benefits based upon a 5 percent whole person functional impairment and awarded claimant future medical benefits upon proper application to the Director. The ALJ denied claimant's request for penalties.

Respondent asserts any future medical treatment will be related to claimant's preexisting condition and not his work-related back strain. Therefore, claimant failed to prove it is more likely than not future medical treatment will be needed for his work injury and thus such benefits should be denied.

Claimant contends the medical evidence proves he will need future medical treatment directly attributable to his work injury. He requests the Board affirm the ALJ's decision regarding future medical treatment. Claimant also requests the Board assess interest and/or penalties in accordance with K.S.A. 44-512b.

The issues are:

1. Is claimant entitled to apply for future medical benefits?

2. Should interest be assessed against respondent for its failure to pay compensation due?

## FINDINGS OF FACT

At the April 28, 2015, regular hearing, the parties stipulated claimant suffered a low back injury by repetitive trauma arising out of and in the course of his employment on April 17, 2013. The parties also stipulated to the independent medical report of Dr. Terrence Pratt and that claimant had a 5 percent whole person functional impairment attributable to his work-related injury by repetitive trauma. The parties reiterated that stipulation at the July 16, 2015, regular hearing continuation. Claimant did not request pre-award interest at the regular hearing, but did so in his submission letter to the ALJ.

Treatment for claimant's low back work injury included two epidural injections, physical therapy and medication. Claimant testified he was still having "quite a bit of pain"[1] in his middle lower back. His pain occurs when engaging in certain work activities, including climbing in and out of a truck, sitting two hours or more, standing or walking too long, bending over to pick up items and reaching above his head. Claimant takes no prescription medications for his back, but does take over-the-counter ibuprofen. Claimant has returned to full duty with respondent.

Claimant acknowledged having preexisting back problems, including:

- seeing a chiropractor in the 1990s for back problems;
- reporting low back pain on July 21, 2000;
- on September 13, 2000, reporting radicular pain down the left buttock and leg and low trunk radiculopathy;
- in 2001 hurting his low back lifting a jack out of his truck;
- reporting numbness and low back pain on July 22, 2002;
- twisting his back and having low back pain while raking leaves on November 26, 2004;
- reporting bilateral lower leg pain on December 23, 2004;

[1] R.H. Trans. at 11.

- seeing a chiropractor beginning August 10, 2010, and continuing for a while for back pain;
- in August 2012, seeing his family physician, Dr. Luerding, and telling him about going to the emergency room two weeks earlier for back pain radiating into the left leg; and
- seeing a chiropractor on February 27, 2013, for pain radiating into the left leg from shoveling snow.

Claimant's pre-injury medical records include:

- a September 14, 2000, MRI showed degenerative disc disease, an L4-5 bulging disc without stenosis and a bulging disc at L5-S1;
- a diagnosis on March 2, 2005, by Dr. Shoaib H. Sunelwala of a right-sided lumbosacral sprain;
- an August 11, 2005, MRI report noted low back and right buttock pain; and
- reporting low back pain with radiating pain and numbness on the right for several weeks to Dr. Susan Anderson on August 17, 2005.

At his counsel's request, claimant was evaluated by Dr. James A. Stuckmeyer on April 30, 2014. Dr. Stuckmeyer reviewed claimant's prior medical records with regard to low back complaints. The doctor noted claimant had a 2000 MRI showing degenerative disc disease with a bulging disc at L4-5 without stenosis and a bulging disc at L5-S1. In his report, Dr. Stuckmeyer stated:

> Fortunately, Mr. Munoz has returned to regular duty status but, as outlined, continues to have ongoing symptoms of significant lower back pain with bilateral lower extremity radiculopathy. From an orthopedic standpoint, I do not feel that additional pain management is warranted, and I do concur with prior examiners that Mr. Munoz has exhausted conservative modalities, and would opine that he has reached maximum medical improvement.[2]

Dr. Stuckmeyer indicated claimant had a 25 percent whole person functional impairment with 10 percent preexisting and 15 percent attributable to claimant's work injury.

In a letter dated January 22, 2015, to claimant's attorney, Dr. Stuckmeyer stated:

> In response to your posed question about other options to assist Mr. Munoz with his back and leg symptoms, I do feel that he would benefit from long term utilization of anti-inflammatory medications, muscle relaxants, and non-narcotic pain medication.

[2] Joint Exhibit 1, Stuckmeyer report (May 28, 2014) at 8.

> It is the opinion of this examiner that the prevailing cause for the necessity of this ongoing pharmacological management is the accident occurring on April 17, 2013.
>
> I certify that the opinions outlined in the aforementioned commentary are rendered to within a reasonable degree of medical certainty.[3]

By order of the ALJ, claimant was evaluated by Dr. Pratt on September 23, 2014. Dr. Pratt's report sets forth numerous instances where claimant sought treatment for low back pain radiating into his lower extremities. The doctor determined claimant had a 12 percent whole person functional impairment with 7 percent preexisting and 5 percent attributable to the injury by repetitive trauma giving rise to this claim. Dr. Pratt was not asked to opine whether claimant would need future medical treatment.

Dr. Eden Wheeler, who treated claimant from September 12, 2013, through February 11, 2014, concluded claimant had no permanent functional impairment attributable to his work injury. With regard to future medical treatment, the doctor opined, "I would not identify that Mr. Munoz requires future medical treatment in relation to his injury of 4/17/2013, and that the prevailing factor for treatment would be his personal and pre-existing medical condition of chronic back and lower extremity symptoms."[4]

With regard to future medical benefits, the ALJ stated:

> Dr. Wheeler['s] records indicate that claimant is not in need of any ongoing medical care. Dr. Wheeler found that claimant suffered no functional impairment as a result of his occupational accident herein. Accordingly that physician's opinion on future medical is not credible since no functional impairment was found. Dr. Pratt, offered no opinion regarding future medical care. Dr. Stuckmeyer indicates claimant would benefit in the future from anti-inflammatory medications. Hence, the more persuasive opinion is that of Dr. Stuckmeyer in this situation and consistent with the functional impairment determined to exist.
>
> Claimant has testified regarding the ongoing difficulties he has suffered as a result of the occupational accident. True that claimant may have had a long standing pre-existing problem, which contributes to his overall need for medical care. The Administrative Law Judge does not at this stage need to [determine] what may be related in the future to his pre-existing problems, and what medical care, if necessary, is related to the sprain as determined by Dr. Pratt. Suffice to say, it is more probably true [than] not true that claimant will need medical care in the future. The issue whether or not that medical care is related to his occupational accident as determine[d] herein, will be addressed at a future date in light of the medical evidence presented at that point. Accordingly, and based upon the foregoing the

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[3] *Id.*, Stuckmeyer letter (Jan. 22, 2015).

[4] *Id.*, Wheeler chart note (Apr. 27, 2015).

Administrative Law Judge finds claimant has overcome the presumption of future medical which is herein awarded upon proper application to the office of the Director.[5]

As noted above, the ALJ denied claimant's request for interest, stating:

The Administrative Law Judge finds that this is not an appropriate situation for the assessment of penalties due to the repetitive nature of claimant's claim, and his long standing pre-existing back condition. The evidence indicates that claimant's pre-existing back condition was stipulated to be seven percent impairment to the body as whole, which is greater [than] the five percent claimant suffers as a result of the accumulative series of repetitive traumas litigated herein. Due to the complexity of these issues, the Administrative Law Judge finds that the Respondent should not be penalized. Respondent has made a good faith attempt to resolve the outstanding issues regarding claimant's permanent functional impairment and entitlement to permanent partial disability. Hence, claimant's request for penalties is herein denied.[6]

## PRINCIPLES OF LAW AND ANALYSIS

### Claimant is entitled to apply for future medical benefits.

K.S.A. 2012 Supp. 44-510h(e) provides, in part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Respondent relies on *Hawkins*,[7] wherein the Board majority stated:

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[5] ALJ Award at 5-6.

[6] *Id.* at 4.

[7] *Hawkins v. Goodyear Tire & Rubber Company*, No. 1,064,097, 2015 WL 996899 (Kan. WCAB Feb. 23, 2015).

> Two of the three physicians indicated claimant did not need additional medical treatment. No doctor testified it was more probably true than not that claimant "will" require future "medical treatment" as defined by K.S.A. 2012 Supp. 44-510h(e). It was claimant's burden to prove the recommendations by Dr. Prostic involved something more than home exercise or over-the-counter medication. He did not do so. The greater weight of the credible medical evidence is that claimant will not need future medical treatment. Claimant did not overcome the presumption contained in K.S.A. 2012 Supp. 44-510h(e).

In the present case, as in *Hawkins*, three physicians evaluated claimant. In *Hawkins*, two physicians indicated Mr. Hawkins needed no additional medical treatment. In the present claim, Dr. Pratt was not asked to give a future medical treatment opinion. Dr. Wheeler opined claimant needed no future medical treatment related to his work injury, while Dr. Stuckmeyer provided an opposing opinion. In *Hawkins*, no physician testified it was more probably true than not that Mr. Hawkins would require future medical treatment. That differs from this case, as Dr. Stuckmeyer opined, within a reasonable degree of medical certainty, that claimant will need ongoing pharmacological management and his work injury was the prevailing cause for that treatment.

The Board notes Dr. Pratt concluded claimant sustained a 5 percent permanent whole person functional impairment as a result of his 2013 work injury. Dr. Stuckmeyer opined claimant had a 15 percent whole person functional impairment for his work injury. Conversely, Dr. Wheeler opined claimant sustained no permanent functional impairment attributable to his work injury. The Board concurs with the ALJ's finding that Dr. Wheeler's future medical opinion is not credible. Dr. Wheeler's opinion that any need for future medical treatment stems from claimant's preexisting low back condition is based on the incorrect premise that his work injury caused no additional functional impairment. The Board finds the future medical opinion of Dr. Stuckmeyer, who was aware of claimant's preexisting low back condition, is more credible than that of Dr. Wheeler.

Claimant overcame the presumption he is not entitled to medical care after reaching maximum medical improvement by proving with medical evidence that it is more probably true than not that he will need additional medical treatment.

**The ALJ's ruling on the issue of pre-award interest is void.**

K.S.A. 44-512b(a) provides:

> Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and

> amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

At the April 28, 2015, regular hearing, the parties agreed claimant sustained a 5% whole person functional impairment as the result of his 2013 work injury. The parties reiterated that stipulation at the July 16, 2015, regular hearing continuation. Respondent did not pay claimant compensation based upon the foregoing stipulation until August 24, 2015. In his submission letter to the ALJ claimant, for the first time, requested interest under K.S.A. 44-512b(a). The ALJ denied claimant's request without holding a hearing to determine if respondent had just cause not to pay claimant compensation to which he was entitled.

In the past, the Board has required a hearing to address whether a respondent should pay pre-award interest under K.S.A. 44-512b(a).[8] In *Wright*,[9] the Board stated:

> Thus, under K.S.A. 44-512b, the time for requesting pre-award interest is at the time of the first full hearing (a.k.a. the regular hearing) or such other time as a hearing on the request can be scheduled and heard before an award is entered by the ALJ. That procedure allows the parties to present evidence on the issue of whether there was just cause or excuse to withhold payment. Here, claimant failed to request pre-award interest until the respondent's terminal date expired. Moreover, claimant did not request a hearing on the issue as required by the statute. As such, claimant's argument that the minimum amount due should have been paid in advance of the award was not properly presented to the ALJ[.]

From the record, it appears respondent had no just cause or excuse for not paying claimant compensation earlier, based upon the parties' functional impairment stipulation at the regular hearing. Claimant did not raise the issue at regular hearing. No hearing was held as required by K.S.A. 44-512b(a) and the parties had no opportunity to present evidence on the issue of pre-award interest. Accordingly, the ALJ's ruling on the issue of pre-award interest is void.

## CONCLUSION

1. Claimant is entitled to apply for future medical benefits.

2. The ALJ's ruling on the issue of pre-award interest is void.

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[8] See *Wright v. LB Steel, LLC*, No. 1,050,151, 2011 WL 2185268 (Kan. WCAB May 13, 2011) and *Hayes v. SPX Cooling Technologies, Inc.*, No. 1,040,574, 2009 WL 5385890 (Kan. WCAB Dec. 3, 2009).

[9] *Wright v. LB Steel, LLC*, No. 1,050,151, 2011 WL 2185268 (Kan. WCAB May 13, 2011).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[10] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE,** that part of the August 10, 2015, Award entered by ALJ Howard finding claimant is not entitled to pre-award interest is void. The Board affirms the ALJ's finding that claimant is entitled to apply for future medical benefits. The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this ____ day of January, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Steven J. Howard, Administrative Law Judge

[10] K.S.A. 2014 Supp. 44-555c(j).